## BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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| **JARED E. ROBINSON**<br>Claimant | ) | |
| V. | ) | |
| **GLASS PRO DIVISION OF DRYWALL SYSTEMS, INC.**<br>Respondent | ) | Docket No. 1,072,761 |
| AND | ) | |
| **AMERISURE MUTUAL INS. CO.**<br>Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 24, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Kenton D. Wirth of Wichita, Kansas, appeared for claimant. Brian J. Fowler of Kansas City, Missouri, appeared for respondent.

The ALJ found claimant's work activities were the prevailing factor for his injury by repetitive trauma and that his injury arose out of and in the course of his employment with respondent. The ALJ determined claimant's date of injury by repetitive trauma to be June 12, 2014, the day claimant was taken off work by a physician for carpal tunnel surgery, and found claimant provided timely notice to respondent via text message on May 29, 2014. The ALJ ordered respondent to provide a list of qualified physicians from which claimant may choose one for treatment. Further, the ALJ ordered respondent to pay and reimburse claimant for previously incurred medical bills and granted temporary total disability benefits for the period of June 12, 2014, through July 28, 2014.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 21, 2015, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Respondent argues claimant failed to meet his burden of proving his work duties were the prevailing factor in his alleged injury by repetitive trauma. Further, respondent

argues claimant's text message of May 29, 2014, does not meet the statutory notice requirements of K.S.A. 2013 Supp. 44-520(a)(4). Respondent contends it did not receive notice of claimant's injury until August 19, 2014, when it received written notice of the claim.

Claimant contends the evidence establishes he sustained injury by repetitive trauma arising out of and in the course of his employment with respondent. Claimant argues his date of injury by repetitive trauma is August 14, 2014, his last day worked at respondent, because no doctor previously related the injury to claimant's work. Alternatively, claimant maintains respondent had proper notice of an injury prior to June 12, 2014, because K.S.A. 2013 Supp. 44-520 does not require the employer to have actual knowledge of a work injury, but merely actual knowledge of an injury.

The issues for the Board's review are:

1. Did claimant's injury by repetitive trauma arise out of and in the course of his employment with respondent?

2. What is the prevailing factor in causing claimant's injury by repetitive trauma?

2. Did claimant provide timely notice to respondent?

## FINDINGS OF FACT

Claimant began employment with respondent in April 2013 as a glazier, caulking and installing commercial windows. Claimant indicated his position with respondent required repetitive and strenuous work. Claimant also performed work for his personal deck renewal company and for a mattress company owned by his mother.

Claimant testified he began noticing symptoms in his upper extremities in November or December 2013. He explained he did not initially feel his symptoms were serious, but later went, on his own, to Dr. Catherine Mitchell with complaints of right forearm and elbow pain. On December 30, 2013, Dr. Mitchell assessed claimant with medial epicondylitis on the right and recommended he exercise regularly. Dr. Mitchell did not tell claimant his upper extremity symptoms were work-related.

On May 21, 2014, claimant went to orthopedic surgeon Dr. Justin Strickland by self-referral. Claimant complained of neck pain, which he indicated began two years prior and steadily progressed. Claimant also complained of numbness and tingling in both hands and right tennis elbow. Dr. Strickland reported, under the heading "History of Present Illness":

> [Claimant] reports that the onset was 2 years ago. He states that this problem was not caused by an injury. He states the injury happened while working at

> [respondent]. The pain is located in bilateral spine/hands. The pain is sharp, throbbing, burning, stabbing, numb.[1]

When asked if he knew what exactly Dr. Strickland meant by these statements, claimant testified:

> A. I don't know.
>
> Q. And when [Dr. Strickland] talks about something that happened two years ago, what body part was he referring to, if you know?
>
> A. That's my neck. It really started aggravating me about two years ago.
>
> Q. So you don't know if that history contains a typographical error or some misstatement from Dr. Strickland, do you?
>
> A. I don't know.[2]

Dr. Strickland performed a physical examination and recommended claimant undergo an NCT/EMG based on symptoms of bilateral carpal tunnel and cubital tunnel syndrome. An NCT/EMG taken May 30, 2014, was positive for bilateral nerve entrapment at the elbows and wrists, the right greater than the left. After reviewing the results of the NCT, Dr. Strickland believed claimant had cubital tunnel syndrome despite a negative test for compression at the elbow. Claimant underwent a right carpal tunnel release and subcutaneous ulnar nerve transposition on June 12, 2014.

Claimant sent a text message to his immediate supervisor, Dave Arnold, on May 12, 2014, advising of the initial appointment with Dr. Strickland. Claimant indicated he made the appointment for his "sore neck, and [his] hands that keep going numb on [him]."[3] He also requested to remain off work, using vacation leave, until the May 21, 2014, appointment because he needed to rest his arms and hands.

Claimant sent an update to Mr. Arnold via text message on May 21, 2014. Claimant wrote, "[M]y doctor says I need surgery for carpel [*sic*] tunnel in both my arms. Before he can operate (for insurance reasons) I have to get nerve test on May 30th . . . ."[4] On May

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[1] P.H. Trans., Cl. Ex. 1 at 18.

[2] P.H. Trans. at 73-74.

[3] *Id*., Cl Ex. 1 at 34.

[4] *Id*. at 35.

29, 2014, claimant sent another message to Mr. Arnold. He said, "Caulking [f***s] my arms up Dave. Not to mention these windows are some of the heaviest I've help[ed] install."[5]

Following his surgery, claimant was taken off work by Dr. Strickland until July 7, 2014, when he was released with temporary restrictions. The work restriction reports issued by Dr. Strickland indicate claimant's restrictions were not work-related. Dr. Strickland did not provide a prevailing factor opinion. Respondent could not accommodate the temporary restrictions, and claimant did not return to work until his full release on July 28, 2014. Claimant believed the loss of his personal health insurance was the cause of his release from Dr. Strickland's treatment.

Matthew Lashley, respondent's safety director, testified respondent provided work assignments for claimant until his last day worked, August 14, 2014. Mr. Lashley explained claimant did not show for work or contact respondent after this date and was considered to have abandoned his job. Claimant testified he did not recall the circumstances of his last day worked or termination from respondent. Mr. Lashley testified no letter of termination was sent to claimant.

Claimant met with Mr. Lashley at respondent's office on August 19, 2014. At the meeting, claimant provided Mr. Lashley with a written request for workers compensation benefits for a series of injuries by repetitive trauma. Claimant testified he did not provide written notice until this time because he initially believed his symptoms were related to his neck pain. Claimant agreed he understood the workers compensation process; he filed a claim and received a settlement related to his knee in 2001.

Mr. Lashley testified all employees receive an Employee Handbook upon hire and receive training on reporting injuries. Claimant signed an acknowledgment of his receipt of the handbook on April 19, 2013.[6] Claimant agreed Mr. Lashley held safety meetings for respondent's employees, but stated repetitive trauma injuries were never discussed. Mr. Lashley disputed claimant's testimony. Mr. Lashley testified:

> Q. So when you have your safety meetings do you go over the potential symptoms of repetitive trauma injuries with your employees so they are aware they have sustained a repetitive trauma injury or not?
>
> A. Yes, that's done through toolbox talks.
>
> Q. So you tell them if you have numbness and tingling in your hands, you need to be coming and talking to me so we can determine if you have a work related injury?

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[5] *Id*.

[6] See P.H. Trans., Resp. Ex. C at 3.

A. On, no, that's not done.[7]

Mr. Lashley said he was not concerned about claimant's prior reports of numbness, tingling, and burning in his hands and arms because claimant had attributed these symptoms to his neck, moving mattresses, and other activities performed outside of his work for respondent. Mr. Lashley stated August 19, 2014, was the first time respondent received any notice from claimant of an on-the-job injury.

Dr. Pedro Murati, a board certified physician, examined claimant on January 12, 2015, at claimant's counsel's request. Claimant complained of pain and tightness in his right elbow, numbness and tingling in both hands, and popping in his right hand. After reviewing claimant's available medical records, history, and performing a physical examination, Dr. Murati listed the following impressions: post right carpal tunnel release, post right subcutaneous ulnar nerve transposition, and left carpal tunnel syndrome. Dr. Murati imposed restrictions and recommended conservative treatment for claimant's left carpal tunnel syndrome, though he also provided a rating opinion related to claimant's upper extremities.

Dr. Murati wrote:

> This claimant's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on each and every working day including 07-28-14 during his employment with [respondent].
>
> . . .
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> Apparently, on this claimant's date of injury he sustained enough permanent structural change in the anatomy of his wrists and right elbow which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of his conditions is the multiple repetitive traumas at work.[8]

Claimant testified he continues having pain, tightening, and numbness in his right arm and currently wears a brace on his right elbow. Claimant stated he has only worked at his mother's store since August 14, 2014, his last day worked at respondent.

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[7] P.H. Trans. at 90.

[8] *Id.*, Cl. Ex. 1 at 53-54.

## PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2013 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the ncreased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given

> case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

## ANALYSIS

The ALJ found claimant suffered an injury by repetitive trauma arising out of his employment with respondent and that the repetitive trauma was the prevailing factor causing claimant's medical condition. The undersigned agrees. Claimant provided an adequate description of the heavy and repetitive work activities that resulted in his physical complaints. Dr. Murati's opinion that claimant's repetitive trauma at work was the prevailing factor in the development of bilateral carpal tunnel syndrome and right ulnar nerve conditions is uncontroverted.

The undersigned agrees with the ALJ's finding that Dr. Strickland's records are inconsistent. Dr. Strickland's references to causation in his records are taken from comments claimant made to him and do not include his own opinion. Claimant met his burden of showing he suffered an injury by repetitive trauma arising out of and the course of his employment with respondent.

The undersigned also agrees with the ALJ's finding claimant provided timely notice of an injury pursuant to K.S.A. 2013 Supp. 44-520. The ALJ's finding claimant suffered an injury by repetitive trauma on June 12, 2014 is not an issue in this appeal. The ALJ found claimant's May 29, 2014, text message to Dave Arnold satisfied the requirement to provide notice. Notice under K.S.A. 2013 Supp. 44-520(a)(4) requires specifics, including the particulars of an injury. In his text message to Mr. Arnold, claimant essentially wrote that the specific activities of caulking and lifting windows caused pain in his arms. It is apparent from the content of the notice claimant suffered a work-related injury.

## CONCLUSION

Claimant suffered an injury by repetitive trauma arising out of his employment with respondent. Claimant provided timely notice of his injury by repetitive trauma.

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2014 Supp. 44-555c(j).

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated April 24, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of June, 2015.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Gary K. Jones, Administrative Law Judge